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OF THE
STATE OF DELAWARE

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Decided: August 22, 2006

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RE: Davis International, LLC, et al. v. New Start Group Corp., et al.
C.A. No. 1297-N

Dear Counsel:

As this court explained in its previous decision imposing a stay,[1] this litigation began in December 2000, when the plaintiffs brought an action in the

[1] *Davis Int'l, LLC v. New Start Group Corp.*, 2005 WL 2899683 (Del. Ch. Oct. 27, 2005).

U.S. District Court for the Southern District of New York, alleging violations of the federal RICO statute, intentional interference with contractual relations, and conversion, all arising from the allegedly illegal takeovers of aluminum and vanadium production facilities located in Western Siberia and the Northern Ural Mountains in the Russian Federation. On March 27, 2003, the federal court dismissed the case on *forum non conveniens* grounds.[2] That dismissal was later affirmed by the U.S. Court of Appeals for the Second Circuit.[3]

On November 4, 2003, the plaintiffs filed a new action in this court, seeking to take advantage of what they perceive to be Delaware's lenient *forum non conveniens* standard. The defendants removed the case to federal court pursuant to 18 U.S.C. § 1441(b), based on federal question jurisdiction. Afterward, the plaintiffs amended their federal court complaint to exclude the non-federal law claims, and then refiled those claims in this court on April 26, 2005, adding new claims for aiding and abetting, conversion, and civil conspiracy. On October 27, 2005, the court granted the defendants' motion to stay those claims[4] in deference to the first filed federal action pursuant to the well known standards set forth in the case, *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*[5] On

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[2] *Base Metal Trading v. Russia Aluminum*, 253 F. Supp. 2d 681, 683 (S.D.N.Y. 2003).
[3] *Base Metal Trading v. Russia Aluminum*, 2004 WL 928165 (2d Cir. Apr. 30, 2004).
[4] *Davis*, 2005 WL 2899683, at * 2-3.
[5] 263 A.2d 281 (Del. 1970).

March 29, 2006, the Delaware district court granted the defendants' motion to dismiss on grounds that it referred to as direct estoppel.[6] That decision is now on appeal to the Third Circuit Court of Appeals.

In response to the district court's decision to dismiss the case, the plaintiffs now ask this court to vacate its stay. In the plaintiffs' view, waiting for the Third Circuit's decision will not only be prejudicial to their claims, in the sense that the resultant delay might further degrade the factual record, but would also be entirely futile because the Third Circuit's decision would have no effect at all on the proceedings before this court. In the plaintiffs' view, either the Third Circuit will uphold the district court's decision to dismiss its case entirely, in which event the plaintiffs will pursue their claims here, or the plaintiffs will win a reversal, and then secure an order prohibiting the defendants from further removal of the federal RICO claims, which they will then add to the present complaint. Thus, in the plaintiffs' view, whatever the Third Circuit decides, the RICO claims will no longer be at issue in the federal court. If that were true, the plaintiffs argue, this court's concern that the RICO litigation would be duplicative of the state law claims would be met, and the continuing stay unjustified.

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[6] *Davis Int'l, LLC v. New Start Group Corp.*, 2006 WL 839364, at *3 (D. Del. Mar. 29, 2006).

The court cannot accept the plaintiffs' view of the federal litigation. First, it ignores entirely the possibility that the Third Circuit might reverse, and allow the RICO claims to proceed before the district court. Indeed, the plaintiffs entirely fail to explain how or why the Third Circuit would prohibit further removal of those federal claims.[7] If the plaintiffs fail to persuade the federal court to adopt that remedy, all the effort the parties would have expended in the interval between the time this court's stay was lifted and the time when the federal action recommenced would be duplicative of the federal case. Worse, this court would then face the unseemly race to judgment against which the Delaware Supreme Court warned in *McWane*,[8] with cases that might have *res judicata* effect against each other proceeding at the same time.

Further, and equally important, the plaintiffs' argument ignores the fact that the defendants have filed a cross-appeal before the Third Circuit, arguing that the

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[7] The plaintiffs' brief before the Third Circuit argues that such relief is justified by the recent case, *Malaysia Intern. Shipping Corp. v. Sinochem Intern. Co. Ltd.*, 436 F.3d 349 (3d. Cir. 2006). But that complex case suggests only that federal courts may dismiss cases on *forum non conveniens* on the condition that some other court exercises jurisdiction. It does not suggest, at least in this court's understanding, any remedy by which a federal court would forbid a defendant from using its statutory right to remove federal questions to federal court. In this case, in other words, *Malaysia International* would allow the Third Circuit to decide it had jurisdiction, and then to dismiss on the basis of *forum non conveniens*, but condition that dismissal on this court's acceptance of jurisdiction. That unremarkable proposition is distinctly different than the remedy, which may or may not be available under federal law, that the plaintiffs seek in the Third Circuit.

[8] 263 A.2d at 283.

district court erred in failing to enjoin what this court has previously characterized as the plaintiffs' efforts to subvert the removal statute. The plaintiffs' only answer to the real possibility of such an injunction appears to be that the defendants' argument is frivolous. Citing the Anti-Injunction Act,[9] a federal statute which prevents federal courts from enjoining their state counterparts, the plaintiffs argue that the Third Circuit is forbidden from taking the step that the defendants seek.

This court need not, and cannot, decide the substantial issue of federal law raised by the parties' dispute about the federal Anti-Injunction Act. Nonetheless, the court cannot ignore the numerous authorities the defendants cite to show that injunctions designed to prevent abuse of the removal statute have long been understood to be permissible as express exceptions to the Anti-Injunction Act.[10] The district court has already found that the plaintiffs were "attempting to subvert the removal statute by splitting claims,"[11] and only failed to issue an injunction because it chose not to reach the jurisdictional prerequisites for that relief.[12] The

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[9] 28 U.S.C. § 2883.

[10] 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4224 n.9. (2d ed. 1988); *See also* 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 121.06[2][b] (2006) ("Federal courts have long recognized removal actions as an 'expressly authorized' exception to the Anti-Injunction Act."); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997) (holding that "where a district court finds that a second suit filed in state court is an attempt to subvert the purposes of the removal statute, it is justified and authorized by § 1446(e) in enjoining the proceedings in the state court," *citing Lou v. Belzberg*, 834 F.2d 730, 740 (9th Cir. 1987)).

[11] *Davis*, 2006 WL 839364, at *14 n.16.

[12] *Id.* at *14.

defendants have presented additional authority to show that federal courts have imposed injunctions in very similar situations.[13] In that context, it is surely possible that the Third Circuit might find adequate jurisdiction to issue an injunction against the very proceedings the plaintiffs would now have this court recommence.

The only case the plaintiffs cite in response, *Chik Kam Choo v. Exxon Corp.*,[14] does not support the plaintiffs' claim that there is no risk of an injunction. In that case, the Supreme Court refused to enjoin a case which had already been dismissed by a federal court on *forum non conveniens* grounds from going forward in state court. But in contrast to the case *sub judice*, the lower court in *Chik Kam Choo* had issued an injunction, not because it suspected abuse of the removal statute, but because it found that remedy necessary to "protect or effectuate" its judgment, under a doctrinally distinct exception to the Anti-Injunction Act than that at issue in the present case.[15]

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[13] *See, e.g., Kansas Public Employees Ret. Sys. v. Reimer & Kroger Assoc.*, 77 F.3d 1063, 1069 (8th Cir. 1996) (holding that an injunction against further proceedings in the state court was appropriate where "the district court specifically found that [the plaintiff's] newly filed state suit . . . was an attempt to subvert the removal of [an earlier case]," and where the plaintiff had "merely tried 'to carve up what was one case into separate cases with separate claims'").

[14] 486 U.S. 140 (1988).

[15] The "protect or effectuate" exception to the Anti-Injunction Act, the Supreme Court explained, "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Id.* at 146. Thus, in *Chik Kam Choo*, that exception did not apply where the federal court had dismissed a case based on *forum non conveniens* under federal law, but where the Texas state *forum non conveniens* standard radically

Thus, the relief that might issue from the Third Circuit remains uncertain, presenting a significant possibility that the circuit court will either enjoin the current action, or will allow the plaintiffs' case to proceed as a whole in district court. This court's reluctance to vacate the stay is only heightened by the plaintiffs' transparently evident efforts to split its claims. While maintaining the stay will impose a further delay on discovery until the Third Circuit issues its opinion, moreover, *McWane's* focus on prompt and complete justice cannot possibly be interpreted as a command to interrupt the routine deliberations of a United States circuit court in the process of deciding an appeal, especially where no facts on the record suggest any special urgency. None of the cases on which the plaintiffs rely for their contrary argument even suggests such a result.[16]

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differed. While there is also some divergence in those standards here, the case *sub judice* has the additional factor of clear facts showing an abuse of the removal statute. Such abuse may be an alternative and independent reason for a federal court to impose an injunction.

[16] *Oralco, Inc. v. Bradley*, 1992 WL 332106 (Del. Ch. Nov. 4, 1992) (refusing to stay a highly expedited, summary proceeding under 8 *Del. C.* § 225 in favor of a much broader jury trial action in West Virginia state court because the West Virginia proceedings were functionally acting as an injunction over the defendant's ability to conduct business, and because the narrow Section 225 action would not interfere with the only marginally first filed West Virginia adjudication); *Kingsland Holdings Inc. v. Fulvio Bracco*, 1996 WL 422340 (Del. Ch. July 22, 1996) (although recognizing that a Dutch court was capable of rendering complete justice, holding that *if* the Dutch case did not proceed in a timely fashion, the court would consider a motion to dissolve the stay in Delaware); *Edonis Corp. v. Trane Co.*, 2002 WL 462271 (Del. Ch. Mar. 19, 2002) (dissolving a stay where the conflicting Texas state proceeding had itself been stayed). *Compare Botney v. Teledyne, Inc.*, 1982 WL 17821 (Del. Ch. Jan. 18, 1992) (explaining, in the context of conditionally dissolving a stay pending a motion for reargument at the federal level, that this court had initially imposed a stay exactly because the "possibility existed" that the Ninth Circuit Court of Appeals might reverse the California district court).

The court will consider the plaintiffs' case when and if it becomes appropriate to do so. At that point, the court will examine closely whether Delaware is an appropriate forum in which to litigate these plaintiffs' claims about their business dealings in Russia. While the federal case is still active, however, and the Third Circuit might well reach a decision which would render litigation before this court duplicative, or might even enjoin this court from proceeding further, the court believes that it should not proceed consistent with the principles of comity the Supreme Court expressed in *McWane*. For those reasons, the plaintiffs' motion to vacate this court's stay is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor